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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MILTON VALENCIA CHAVEZ, Defendant and Appellant.	B236881 (Los Angeles County Super. Ct. No. BA381955)

APPEAL from a judgment of the Superior Court of Los Angeles County, Renee Korn, Judge. Affirmed.

A. William Bartz, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Kim Aarons, Deputy Attorneys General, for Plaintiff and Respondent.

In a plea bargain, appellant Milton Valencia Chavez pled nolo contendere to two felony narcotics counts. The crimes were committed on March 9, 2011, the criminal complaint was filed on March 11, 2011, the plea was entered on September 28, 2011, and sentencing was on October 7, 2011. Appellant was in local custody for 141 days, and received credit against his sentence for that time. The issue in this case is whether he was entitled to conduct credit at the enhanced rate of two days for each two days served. The trial court ruled that he was not. He contests that ruling in this timely appeal.[1]

There was no error.

Presentence conduct credit is governed by Penal Code section 4019.[2] It is awarded for good conduct by the prisoner, and its purpose is to "encourage conformity to prison regulations, to provide incentives to refrain from criminal, particularly assaultive, conduct, and to encourage participation in 'rehabilitative' activities." (*People v. Austin* (1981) 30 Cal.3d 155, 163.) That statute historically awarded conduct credit to qualifying prisoners at the rate of two days for every four days served (in effect a one-for-two rate). Section 4019 was amended in 2009, with an operative date of January 25, 2010, to increase the rate of credit to two days of conduct credit for every two days spent in local custody. (*People v. Brown* (2012) 54 Cal.4th 314, 318–319, (*Brown*).) Section 4019 was amended again, effective September 28, 2010 (Stats. 2010, ch. 426, §§ 1, 2, 5) to restore the former one for two rate. That rate was in effect until October 1, 2011, when

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[1] Respondent argues the appeal should be dismissed because appellant did not raise his present arguments about entitlement to the more generous credit provisions in the trial court, and even if they present a pure question of law, he has forfeited them on that account. Appellant does not address these arguments in his reply brief. But it appears that he is arguing that the trial court miscalculated his entitlement to credits. Moreover, he was sentenced on October 7, 2011, and the most recent amendment to the statute, in the realignment law (Stats. 2011-2012, ch. 39, § 53; see *People v. Rajanayagam* (2012) 211 Cal.App.4th 43) had just become operative less than a week before that date. The issue has been briefed, and even were it procedurally barred, it is properly considered on appeal in order to "eliminate any uncertainties that could lead to time-consuming but ultimately unavailing ineffective-assistance-of-counsel claims." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1044, fn. 5.)

[2] All statutory references are to the Penal Code.

additional amendments to section 4019 provided a two for two calculation based on four days of credit for two days of custody. (Stats. 2011, ch. 15, § 482; *People v. Lara* (2012) 54 Cal.4th 896, 905, fn. 8; Stats. 2011, ch. 39, § 53; Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 35.) The amendment effective October 1, 2011 is expressly made applicable only to prisoners whose crimes were committed on or after that date. (§ 4019, subd. (h).)

Although appellant committed the crime charged here on March 9, 2011, he claims the 2011 amendment of section 4019 is applicable to crimes committed before October 1, 2011 or thereafter, both as a matter of statutory construction and on the basis of equal protection. As noted by appellant in his opening brief, at the time that brief was filed, *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*) was under review before the Supreme Court to raise the issue of retroactive application of enhanced conduct credits under section 4019. That case has since been decided. Applying well-established principles of statutory construction, the court held the enhanced credit version of section 4019 "applied prospectively, meaning that qualified prisoners in local custody first became eligible to earn credit for good behavior at the increased rate beginning on the statute's operative date." (*Brown*, at p. 318.) In addition, subdivision (h) of section 4019 specifically provides that the changes effected by the enhanced credit statute "shall apply prospectively and shall apply to prisoners who are confined to a county jail, . . . for a crime committed on or after October 1, 2011."

This leaves an issue as to the appellant's entitlement to the benefits of the most recent revision of section 4019. That amendment was effective on September 21, 2011 and operative on October 1, of that year. As we have discussed, it applies only to prisoners whose crimes were committed on or after October 1, 2011 and hence, by its terms, it does not apply to appellant, whose crimes were committed in March of that year. Appellant argues that he is entitled to its benefits nevertheless, based on equal protection principles. He argues the rationale in *Brown* does not apply (or, if it does, there still is a violation of federal equal protection) because he had been in custody since March 2011, and still was in custody on the October 1 operative date of the most recent amendment to section 4019.

The problem with that analysis is that the legislation is express in its coverage and scope; the new law applies only to persons whose custody is based on a crime committed on or after October 1, 2011. Appellant's crime was committed before that date.[3] Appellant argues that a prisoner in custody both before and after October 1, 2011 is just as encouraged to earn good conduct credits as is one whose custody began after that date, so that denying it to one while granting it to the other would violate the equal protection principle.

We are not persuaded.

This issue was presented and recently decided in *People v. Lynch* (2012) 209 Cal.App.4th 353 (*Lynch*). The court pointed out that "[t]he right to equal protection . . . does not prevent the state from setting a starting point for a change in the law." (*Id.* p. 359.) In doing so, the Legislature may properly specify that such statutes are prospective only, in order to assure that penal laws will retain their desired deterrent effect by carrying out the original prescribed punishment as written. (*Id.* p. 360, citing *In re Kapperman* (1974) 11 Cal.3d 542, 546; see also *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9; *Brown*, *supra*, 54 Cal.4th at pp. 328–329.) In addition, the Legislature may experiment individually with various therapeutic programs related to criminal punishment, and the Realignment Act is "if nothing else, a significant experiment by the Legislature. Prospective application is reasonably related to the Legislature's rational interests in limiting the potential costs of its experiment. Nothing prevents the Legislature from extending the Realignment Act to all criminal defendants if it later determines that policy is worthwhile." (*Lynch*, *supra*, 209 Cal.App.4th at p. 361; see also *People v. Kennedy* (2012) 209 Cal.App.4th 385, 388; *People v. Garcia* (2012) 209 Cal.App.4th 530, 533.)

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[3] The briefing also discusses a pre-*Brown* decision, *People v. Olague* (2012), formerly reported at 205 Cal.App.4th 1126. Review has been granted in that case (Aug. 8, 2012, S203298).

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.